

September 7, 2005

Kent County - Civil Division (739-7641)

Ms. Maryanne McGonegal
Secretary, Common Cause of Delaware
1304 N. Rodney Street
Wilmington, DE 19806

RE: **Freedom of Information Act Complaint
Against New Castle County Council**

Dear Ms. McGonegal:

On July 15, 2004, we received your complaint alleging that the New Castle County Council ("the Council") violated the open meeting requirements of the Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"), by holding a "special meeting" on July 11, 2005 for seven of the thirteen members of the Council to discuss a pending lawsuit with the County Attorney. You allege that "a meeting of seven members of the New Castle County Council constitutes a meeting of a 'public body.' The 'Special Meeting Notice' appears to exclude not only the public but also the remaining New Castle County Council members who are not the subject of a recently filed lawsuit." ¹

By letter dated July 26, 2005, we asked the Council to respond to your complaint by August 8, 2005 and to "provide us with a copy of the notice, agenda, and minutes for the meeting

¹ In your complaint, you also question "whether the 'County Attorney' is the County Council's attorney or the attorney for the Executive Branch of New Castle County government" and whether the County Attorney "would be permitted to offer confidential advice to seven Council members at the exclusion of the other six Council members." Those issues are not within our jurisdiction under FOIA.

held on July 11, 2005, including the minutes of any executive session which we will review *in camera* and treat confidentially." We granted the Council's request for a brief extension of time to respond to your complaint, and received the Council's response on August 15, 2005.

On August 17, 2005, we requested additional information from the Council, which we received on August 23, 2005 after the Council's attorney returned from vacation.

According to the Council, on "June 29, 2005, the former Council auditor Robert Hicks ('Hicks') filed an employment discrimination suit against seven Council members, in both their official and individual capacities ('the Individually Named Defendants') . . . As can be expected when one faces potential personal liability, the Individually Named Defendants had numerous questions and concerns about being sued in their individual capacity. Gregg Wilson, the County Attorney, and [Counsel to the Council] decided to hold a meeting on Monday, July 11, 2005 at 2:00 p.m. with the Individually Named Defendants to address any individual questions or concerns and to discuss litigation strategy."

The Council contends that this gathering "was **not** a meeting of the public body to discuss or vote on public business" (emphasis in the original). Out of an abundance of caution, the Council posted a notice of the gathering as a special meeting on June 30, 2005.² The agenda for that meeting stated: "The purpose of this meeting is for such Council members individually named to discuss pending litigation with their attorney. Therefore, in order to maintain confidentiality and to protect

² Technically, this was not a "special" meeting as defined by FOIA because the Council posted notice of the meeting at least seven days in advance. *See 29 Del. C. §10004(e)(3)* (defining a "special meeting" as "one to be held less than 7 days after the scheduling decision is made").

the attorney/client privilege, this meeting will take place in Executive Session." The Council revised the agenda for the July 11, 2005 gathering on July 9, 2005 "to clarify that this is not a Council Meeting, it is a meeting between the County and the individually named defendants." ³

We reviewed the minutes of the July 11, 2005 meeting, which are still in draft form but the Council provided for our *in camera* review. The minutes show that nine Council members were present as well as the County Attorney and Counsel to the Council. ⁴

According to the Council, on "Monday, July 11, 2005 at 2:00 p.m. the Meeting convened. . . . Because both Councilman Tansey and Councilman Street had been sued in their official capacity (as 'the County' was a named defendant), President Clark requested that the County Attorney first discuss litigation strategy with regard to the suit against the council members in their official capacity; then, assuming neither Councilman Tansey nor Councilman Street had an objection, that he discuss litigation strategy with regard to the suit against the Individually Named Defendants. All those present agreed to proceed in such fashion, and a vote was taken to go into Executive Session."

³ FOIA provides: "When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda." 29 *Del. C.* §10004(e)(5). The Council posted a revised agenda for the July 11, 2005 meeting at least six hours in advance. We do not believe that FOIA required the Council to explain in the revised agenda "the reasons for the delay in posting" because the Council did not add or delete any items on the original agenda but rather clarified the purpose of the meeting.

⁴ According to the draft minutes of the executive session, the Council members present were: Timothy Sheldon, George Smiley, Paul Clark, Joseph Reda, Karen Venezky, William Tansey, Patty Powell, David Tackett, Jea P. Street, and Bill Bell. Counsel to the Council has represented that Mr. Tackett was not in fact present and that the listing of his name was a typographical error.

According to the Council, when nine members of the Council first gathered in the New Castle County Conference Room at 2:00 p.m. on July 11, 2005 the door to the room was open and the public could have attended the start of the meeting (though none did). After the members discussed how to proceed with legal advice from the County Attorney and voted to go into executive session, the door was shut.⁵

The minutes of the executive session show that the County Attorney made a presentation regarding the Hicks lawsuit and the defendants' litigation strategy, followed by a question-and-answer period during which the County Attorney answered members' questions regarding the pending litigation, litigation procedures, and defense strategies.

⁵ "If a public body meets to discuss only matters that are authorized for executive session, FOIA still requires that the meeting be noticed to the public. The public have a right to attend the opening of the meeting" and "to see that the public body follows the required procedures for going into executive session." *Att'y Gen. Op.* 02-IB17 (Aug. 6, 2002). The record shows that the Council complied with those requirements even though no members of the public were in the audience.

Relevant Statutes

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by law. 29 *Del. C.* §10004(a).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10001(e).

FOIA defines "public business" as "any matter over which the public body has supervision, control, jurisdiction or advisory power." *Id.* §10001(b).

FOIA authorizes a public body to meet privately in executive session to discuss "[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body." *Id.* §10004(b)(4).

Legal Analysis

A. July 11, 2005 Gathering

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." 29 *Del. C.* §10001(e). A quorum (nine) of the thirteen-member Council gathered at the County Council Conference Room at 2:00 p.m. on July 11, 2005. The issue then is whether the gathering was to discuss or take action on "public business." FOIA defines "public business" as "any matter over which the public body has supervision, control, jurisdiction or advisory power." 29 *Del. C.*

§10001(b).

In *The News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977) (Brown, V.C.), eleven of the thirteen members of the Wilmington City Council met to discuss the potential repeal of the city wage tax. The council argued that this was not a "meeting" subject to FOIA because the council did not have supervision or control over whether the General Assembly repealed the city wage tax. Nor did the council exercise advisory power over the General Assembly because "everyone has a right to offer advice and opinion to members of a legislative body." 377 A.2d at 361. The Chancery Court disagreed. "[T]he purpose of the gathering was not merely for academic discussion on the repeal of a statute which would have no effect upon the City. Rather it was to consider possible action by the General Assembly which, if taken, could have abolished the Wilmington wage tax and thereby compelled a restructuring of City finances, both matters over which City Council clearly had control, supervision and jurisdiction." *Id.*

In *Att'y Gen. Op.* 01-IB13 (Aug. 9, 2001), we rejected the city council's argument that discussion of a municipal waste transfer facility was not "public business" because only the Levy Court had authority to grant or deny a conditional use permit. "The decision by the Levy Court will have an impact on waste removal in the City of Dover, a matter 'over which the City Council clearly had control, supervision and jurisdiction.' The purpose of the Council's proclamation was 'to persuade' the Levy Court not to grant a conditional use permit." *Id.* (quoting *McLaughlin*, 377 A.2d at 360).

The Council contends that the gathering of nine Council members on July 11, 2005 was not

a "public meeting" for purposes of FOIA because they did not discuss any matters of "public business" as defined by FOIA. According to the Council, the gathering "was not scheduled for the purpose of discussing or taking any action on any 'public business' (i.e. any matter over which the public body has supervision, control, jurisdiction or advisory power). To the contrary, the Meeting was held to provide counsel to the defendants so that they would be able to make decisions regarding their respective representation and trial strategy. Nothing was discussed that would have required discussion, deliberation, or a decision to be made by the legislative body of New Castle County."

As to the specific issue whether the Council discussed matters of public business, we make several observations. Arguably, the Council does not have supervision, control, jurisdiction or advisory power over the conduct of the litigation with respect to the seven members of the Council who are named as individual defendants in the Hicks' lawsuit. If so, any discussion between the County Attorney and the seven individual defendants about the pending litigation and their exposure, defenses, and litigation strategy as individual defendants would not be matters of "public business" as defined by FOIA which must be discussed in a meeting open to the public.

On the other hand, the litigation strategy of the individual defendants could have an effect upon the Council in that a settlement or jury award of damages or other cost which would have to be paid by the taxpayers, directly or in the form of higher insurance premiums. Those are matters over which the Council has supervision or control. The "public business" issue is further clouded by the attendance at the July 11, 2005 executive session of two Council members who are not named as individual defendants in the Hicks' lawsuit, and the discussion of both litigation strategy with

respect to the Council and members sued in their official capacity, and members sued in their individual capacity.⁶

We do not have to resolve this issue, however, because we believe that FOIA authorized the Council to discuss litigation strategy in the Hicks' lawsuit in executive session.

B. Executive Session

"FOIA is a statutory public waiver of any possible [attorney-client] privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute." *Att'y Gen. Op.* 02-IB12 (May 21, 2002). The statute authorizes a public body to consult with an attorney in executive session "with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body." 29 *Del. C.* §10004(b)(9). These limitations were designed "to prevent potential abuse" and do not permit a public body "to hold an executive session to receive legal advice about any issue or matter." *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, No. 1216-K, 1994 WL 274295, at p.11 (Del. Ch., May 18, 1994) (Jacobs, V.C.) (emphasis in the original).

Even if the gathering of nine members of the Council on July 11, 2005 was to discuss "public

⁶ In your complaint, you suggest a deliberate exclusion from the July 11, 2005 meeting of "the remaining New Castle County Council members who are not the subject of [the Hicks'] lawsuit." The record suggests the contrary. Two Council members who are not individual defendants attended the meeting, and we have not received any complaint from any member of the Council who felt or thought he or she was excluded from the meeting.

business" as defined by FOIA, the Council contends that a quorum of the Council lawfully met in executive session as authorized by FOIA. "The Executive Session was held for a proper purpose: a legal strategy session involving legal advice and opinions from the County Attorney with respect to the pending Hicks litigation. Clearly these matters are protected by the attorney-client privilege, . . . and additionally fall within the purview of litigation strategy. Therefore, the purpose behind the Executive Session was lawful."

Based on the record, we agree that FOIA authorized the Council to meet in executive session on July 11, 2005 to discuss litigation strategy in a pending lawsuit in which the Council and seven members of the Council are defendants. We also find, based on our *in camera* review of the minutes of the executive session, that FOIA authorized that discussion in private because meeting in public "would have an adverse effect on the bargaining or litigation position of the public body." 29 *Del. C.* §10004(b)(4).

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Conclusion

For the foregoing reasons, we determine that the Council did not violate the open meeting requirements of FOIA when nine of the members of the Council met in executive session on July 11, 2005 to discuss pending litigation with the County Attorney. FOIA authorized the Council to meet in private with the County Attorney to discuss litigation strategy because an open meeting would have had an adverse effect on the litigation position of the Council and the individual defendants.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin, Esquire
State Solicitor

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